

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 166

June 22, 1998, 5:12 p.m.
Page S-6761 Temp. Record

MOLLWAY NOMINATION/District Judge

SUBJECT: Nomination of Susan Oki Mollway, of Hawaii, to be a District Judge for the District of Hawaii. Confirmation.

ACTION: NOMINATION CONFIRMED, 56-34

SYNOPSIS: Susan Oki Mollway, of Hawaii, was born November 6, 1950, in Honolulu, Hawaii. She received a B.A. in 1971 and an M.A. in 1973 from the University of Hawaii, and she received a J.D. from Harvard Law School in 1981. Her employment history includes the following: 1973-1975, Instructor, Department of English, University of Hawaii; 1975-1976, Instructor, Takushoku University; 1976-1978, Editor, Charles E. Tuttle Publishing Company; 1981-present, Associate then Partner, Cades, Schutte, Fleming, & Wright; and 1995-present, Director, Hawaii American Civil Liberties Union.

Those favoring confirmation contended:

Argument 1:

Susan Oki Mollway will be an outstanding judge. She graduated cum laude from Harvard Law School in 1981, and for the past 17 years has had a very successful litigation practice with one of the largest and most respected law firms in the State of Hawaii. Her litigation experience covers areas from Federal labor law to contract disputes to lender liability, and she has argued cases before every level of the State and Federal courts, including a successful appearance before the United States Supreme Court. Consideration of this nominee has been delayed due to concern that she may be an activist judge once she is appointed. The basis given for that concern is that she was on the board of directors of the American Civil Liberties Union (ACLU) of Hawaii during a time when the Hawaii ACLU took a number of controversial positions on issues such as same-sex marriage, minimum sentencing, parole, and drug testing. We have questioned her on those matters. She has said that she was not actively involved in pressing those issues during

(See other side)

YEAS (56)			NAYS (34)		NOT VOTING (10)	
Republicans (14 or 29%)	Democrats (42 or 100%)		Republicans (34 or 71%)	Democrats (0 or 0%)	Republicans (7)	Democrats (3)
Cochran	Akaka	Hollings	Abraham	Helms	Bennett ⁻²	Leahy ^{-2AY}
Collins	Baucus	Inouye	Allard	Hutchinson	Chafee ⁻²	Moseley-Braun ⁻²
DeWine	Biden	Johnson	Ashcroft	Hutchison	D'Amato ⁻²	Reid ⁻²
Gregg	Bingaman	Kennedy	Bond	Inhofe	Domenici ⁻²	
Hagel	Boxer	Kerrey	Brownback	Kempthorne	Murkowski ⁻²	
Hatch	Breaux	Kerry	Burns	Kyl	Specter ⁻³	
Jeffords	Bryan	Kohl	Campbell	Lott	Thomas ⁻²	
Lugar	Bumpers	Landrieu	Coats	McCain		
Mack	Byrd	Lautenberg	Coverdell	McConnell		
Roth	Cleland	Levin	Craig	Nickles		
Smith, Gordon	Conrad	Lieberman	Enzi	Roberts		
Snowe	Daschle	Mikulski	Faircloth	Santorum		
Stevens	Dodd	Moynihan	Frist	Sessions		
Thompson	Dorgan	Murray	Gorton	Shelby		
	Durbin	Reed	Gramm	Smith, Bob		
	Feingold	Robb	Grams	Thurmond		
	Feinstein	Rockefeller	Grassley	Warner		
	Ford	Sarbanes				
	Glenn	Torricelli				
	Graham	Wellstone				
	Harkin	Wyden				

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

her tenure as a board member, that on many of them she has not formed a personal opinion, and that her personal opinions are irrelevant in any event, because she will base her decisions on the Constitution, statutes, and precedents rather than her own preferences. We believe her, and urge our colleagues to vote in favor of her confirmation.

Argument 2:

We agree that this nominee should be confirmed. We note also that President Clinton's women, minority, and Hispanic nominees tend to take a lot longer to confirm than other nominees. Why? They are equally able. In the absence of any other valid explanation, we can only conclude that they are being held up precisely because of their race, ethnicity, and gender. Further, we must again complain about the very slow pace of confirming judges. These complaints aside, we are pleased to vote in favor of confirmation.

Argument 3:

The delay on this nominee was proper due to concerns that she may prove to be a judicial activist once appointed. She served on the board of directors of the ACLU in Hawaii, and actively raised funds for it, in 1995 and 1996. During those years, the Hawaii ACLU took several very controversial and radical positions with which we, and the vast majority of the American people, strongly disagree. However, she has assured us to the extent that she has any personal opinions on those issues they will not guide her decisions as a judge, and, after extensive investigation, we have found no reason to doubt that statement. Therefore, because we believe an administration's judicial nominees should be given the benefit of the doubt, we will vote for confirmation.

With that said, we must again rise to defend the pace of confirming judges in the Senate, because some Senators have again chosen to claim that the pace is abnormally slow, and they have again chosen to make the contemptible and seedy allegation that this supposedly slow pace is based on racism and sexism. We are disappointed that some Senators have chosen to play this low form of gutter politics, but we will respond with facts instead of in kind. First, there are both record numbers of Federal judges (767) and senior judges (more than 400) serving. Second, during the 2 Clinton years that Democrats controlled the Senate and were confirming the President's nominees, the Clinton Administration bragged that "full employment" had been reached in the judiciary because the vacancy rate was down to 7 percent. According to its calculations, it could not reasonably go below that rate because of normal attrition and because of the amount of time it takes to confirm a judge. Today a 7-percent vacancy rate would be 60 vacancies; there are currently just 73 vacancies. Third, for the majority of our Democratic colleagues who were here under President Bush when Democrats controlled the Senate, we remind them that the vacancy rate in May of 1992 was 117 and in May of 1991 it was 148. Fourth, we point out that the Senate cannot confirm people who have not been nominated. The Clinton Administration has failed to nominate anyone for 28 of the positions, and for another 15 it has only submitted names in the last month. Fifth, the Alliance for Justice, a liberal watchdog group, has busily tabulated statistics on the 270 Clinton judges who have been confirmed and has found that 70 were women, 42 were African-Americans, 13 were Asians, and 4 were Hispanics. Those numbers expose the lie behind our colleagues' assertion that we are being racist or sexist in the confirmation process. Throughout this Congress, certain Senators have made base and baseless allegations of bigotry in the confirmation process. They will probably continue to make those allegations. When they do, we will refute them with facts, and we will continue to either favor or oppose nominees based on their merit. We will vote for this nominee not because of her race, gender, or ethnicity, but because we believe she is qualified for the post and because we have no evidence that she will be a judicial activist.

Those opposing confirmation contended:

We believe Susan Mollway will be a liberal activist judge. She served on the board of the Hawaii ACLU at a time when it argued in favor of same-sex marriages, argued against mandatory minimum sentencing laws, argued against efforts to restrict parole, opposed efforts to warn families when convicted sexual predators moved into their neighborhoods, and argued against employee drug testing. In the past, the type of lawyer who favors such extreme positions is the type of lawyer who has been an activist when put on the Federal bench. Making matters worse, if she were appointed, she would serve in the ninth judicial circuit, which is the most liberal, activist, and reversed circuit in the country, and which is too large to maintain collegiality and consensus (which exacerbates the tendency of rogue judges to issue unconstitutional, activist decisions). Our colleagues are asking us to believe that a member of the board of directors of one of the most radical legal groups in America will not be an activist judge if she is appointed to a judicial circuit that continually issues blatantly unconstitutional decisions, and which is structured so as to encourage judges to act as independent laws unto themselves. Our colleagues are asking too much. We hope they are right about this nominee, but we are not willing to take that chance. We urge Senators to vote against confirmation.